DELIVERING FAIRNESS: THE NEED FOR AN ANTITRUST STANDARD THAT CONSIDERS LABOR MARKET CONSOLIDATION IN THE GIG ECONOMY

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The rapid spread of the COVID-19 pandemic left consumers to figure out how to bring the comforts of the world into their homes. Few industries benefited from this trend like the food delivery industry. Revenue more than doubled for the major food delivery companies during the pandemic, and these traditionally unprofitable companies posted profitable quarters in 2020 and 2021. But while the companies continue to grow, restaurants and delivery drivers generally have not profited in tandem. Food delivery drivers have been exposed to increased safety risks. They have also been underpaid and have not received all their promised tips. Because the platforms classify delivery personnel as independent contractors, rather than employees, the platforms do not have to provide delivery personnel a minimum wage or health benefits.

The rise of gig economy services, which include the food delivery platforms, has also increased calls to update labor laws because of complaints about how gig economy companies exploit their labor. Although gig economy workers share many of the same qualities as employees, gig economy workers are usually classified as independent contractors to determine whether federal and state collective organizing laws protect their actions and whether they qualify for employee benefits.

This Note will discuss the intersection of antitrust law and labor law in the gig economy space, centered around food delivery platforms. This Note will then argue that antitrust enforcers and courts should analyze potential antitrust violations under a "fairness" standard that considers how consolidation of market power affects upstream markets like the labor market.

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TABLE OF CONTENTS

INTRODUCTION

The COVID-19 pandemic significantly changed consumer preferences. In the United States, the rapid spread of the virus and fear of disease, along with a host of local restrictions, left consumers to figure out how to bring the comforts of the outside world into their homes.[1] People bought new televisions, watched movies previously available in theaters through streaming services, and bought state-of-the-art stationary bikes.[2] Analysts believe the trend of building a "home nest" is here to stay due to the continued uncertainty around the pandemic and the simple comforts that can be brought to a person's home.[3] Few industries have benefited from this trend as much as the food delivery industry.

Food delivery companies took advantage of people staying at home to boost their profits. Revenue more than doubled for the major food delivery companies, from $2.5 billion to $5.5 billion between 2019 and 2020.[4] Online food delivery platforms rarely post profits, but DoorDash, the largest one, posted a profitable quarter in 2020.[5] Likewise, Uber Eats, the food delivery arm of Uber, Inc.,

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1. *See* Jaana Remes & Anu Madgavkar, *This is the COVID Consumer Trend Most Likely to Stick Beyond the Pandemic*, MCKINSEY (June 21, 2021), https://www.mckinsey.com/mgi/overview/in-the-news/this-is-the-covid-consumer-trend-most-likely-to-stick-beyond-the-pandemic [https://perma.cc/5XJU-FVUM].

2. *Id.*

3. *Id.*

4. Levi Sumagaysay, *The Pandemic Has More than Doubled Food-Delivery Apps' Business. Now What?*, MARKETWATCH (Nov. 27, 2020, 7:00 AM), https://www.marketwatch.com/story/the-pandemic-has-more-than-doubled-americans-use-of-food-delivery-apps-but-that-doesnt-mean-the-companies-are-making-money-11606340169/ [https://perma.cc/NE6R-9GQL].

5. Preetika Rana & Maureen Farrell, *DoorDash IPO Filing Shows Big Revenue Growth, Profitable Quarter*, WALL ST. J. (Nov. 13, 2020, 3:28 PM), https://www.wsj.com/articles/doordash-ipo-filing-shows-a-profitable-quarter-11605276373?mod=article_inline [https://perma.cc/9ADQ-K4ME].

was profitable for a quarter in 2021.[6] The platforms are still struggling to turn a profit, but the industry continues to grow.[7] Analysts expect this trend to continue given changing consumer trends and new investments.[8]

While the food delivery platforms are seeing increased revenues, restaurants and delivery personnel generally have not profited in tandem. Food delivery drivers have been underpaid and have not received all of their promised tips.[9] They have also faced safety problems while going between restaurants and houses during the pandemic.[10] The platforms have not addressed these issues.[11] Because the platforms classify delivery personnel as independent contractors rather than employees, the platforms do not have to provide delivery personnel a minimum wage or health benefits.[12]

Although online food delivery has allowed restaurants to continue serving customers during the pandemic, the platforms generally levy a 15–30% surcharge on orders, which is often unsustainable for restaurants that already operate on thin margins.[13] Restaurant industry and antitrust groups have called for investigations against the food delivery companies that would address the pressure on restaurants.[14] Antitrust concerns are common when groups of consumers and industries in vertical markets feel squeezed by concentrated power,[15] and this scenario is no different. In

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6. Julie Littman, *Uber Eats' Restaurant Delivery Reaches Profitability for First Time*, RESTAURANT DIVE (Nov. 8, 2021), https://www.restaurantdive.com/news/uber-eats-restaurant-delivery-reaches-profitability-for-first-time/609608/ [https://perma.cc/M6DD-94TV].

7. Kabir Ahuja et al., *Ordering in: The Rapid Evolution of Food Delivery*, MCKINSEY (Sept. 22, 2021), https://www.mckinsey.com/industries/technology-media-and-telecommunications/our-insights/ordering-in-the-rapid-evolution-of-food-delivery [https://perma.cc/E2FD-TZ3D].

8. *Id.*

9. Kimiko de Freytas-Tamura, *Food Delivery Apps Are Booming. Their Workers Are Often Struggling.*, N.Y. TIMES (Oct. 12, 2021), https://www.nytimes.com/2020/11/30/nyregion/bike-delivery-workers-covid-pandemic.html [https://perma.cc/TH2V-WETF].

10. *Id.*

11. *See id.*

12. *Id.*

13. Jenn Harris, *The Next Time You Order Takeout, Call the Restaurant*, L.A. TIMES (Mar. 3, 2021, 7:00 AM), https://www.latimes.com/food/story/2021-03-03/food-delivery-service-app-fees-restaurants/ [https://perma.cc/R2VX-6ZD6]; Charlotte Schubert, *Seattle Approves Permanent 15% Fee Cap on Food Delivery Companies, with Key Compromise*, GEEKWIRE (Aug. 2, 2022, 4:34 PM), https://www.geekwire.com/2022/seattle-lawmakers-approve-permanent-15-fee-cap-on-food-delivery-companies-with-key-exception/ [https://perma.cc/6M4V-PEY6].

14. *See* Harris, *supra* note 13; Schubert, *supra* note 13; Sam Sabin, *Tech Antitrust Groups Have a New Target: Food Delivery Apps*, MORNING CONSULT (Aug. 11, 2020, 6:00 AM), https://morningconsult.com/2020/08/11/food-delivery-apps-tech-antitrust-campaign-ftc/ [https://perma.cc/GD44-QAYN].

15. *See* William A. Galston & Clara Hendrickson, *A Policy at Peace with Itself: Antitrust Remedies for Our Concentrated, Uncompetitive Economy*, BROOKINGS (Jan. 5, 2018), https://www.brookings.edu/research/a-policy-at-peace-with-itself-antitrust-remedies-

the food delivery industry, however, the calls for litigation reflect how concentrated the industry already is. DoorDash held the largest market share measured by monthly sales as of May 2022 with 59%, followed by Uber Eats with 24%, Grubhub with 13%, and Postmates with 3%.[16] This high level of market concentration suggests an oligopolistic market.[17] Additionally, when reports emerged that Uber was in talks to buy Grubhub, federal lawmakers called on antitrust regulators to scrutinize the potential deal.[18]

The rise of gig economy services, which include the food delivery platforms, has also increased calls to update labor laws.[19] Although gig economy workers share many of the same qualities as employees, gig economy workers are usually classified as independent contractors to determine whether federal and state collective organizing laws protect their actions and whether they qualify for employee benefits.[20] Legislative measures and ballot initiatives to reclassify gig economy workers have seen mixed results. At the federal level, the Protecting the Right to Organize Act of 2021 ("PRO Act") would allow gig economy workers to be classified as employees for the purposes of collective organizing, but the bill has not moved since passing the House of Representatives.[21] The most significant proposal at the state level was a California law that would classify gig economy workers as employees for state benefit purposes; however, a ballot initiative

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for-our-concentrated-uncompetitive-economy/ [https://perma.cc/7QET-PPXX] ("During the past 125 years, there have been three great waves of mergers and corporate concentration, each followed by a burst of political and legislative activity [around antitrust].").

16. Janine Perri, *Which Company is Winning the Restaurant Food Delivery War?*, BLOOMBERG SECOND MEASURE (June 15, 2022), https://secondmeasure.com/datapoints/food-delivery-services-grubhub-uber-eats-doordash-postmates/ [https://perma.cc/FE9U-DXNR].

17. *See Oligopoly*, INVESTOPEDIA, https://www.investopedia.com/terms/o/oligopoly.asp [https://perma.cc/DX63-MS4V] (last updated Oct. 21, 2021) (defining an oligopoly as "a market structure with a small number of firms" and further elaborating that an oligopoly market structure consists of "two or more firms").

18. Lauren Hirsch, *Klobuchar and Democrats Push Antitrust Regulators to Scrutinize Uber's Potential Deal for Grubhub*, CNBC (May 20, 2020, 3:34 PM), https://www.cnbc.com/2020/05/20/klobuchar-pushes-antitrust-regulators-to-scrutinize-potential-uber-deal-for-grubhub.html/ [https://perma.cc/V748-SUVK].

19. Rachel M Cohen, *The Coming Fight Over the Gig Economy, Explained*, VOX (Oct. 12, 2022, 7:30 AM), https://www.vox.com/policy-and-politics/2022/10/12/23398727/biden-worker-misclassification-independent-contractor-labor [https://perma.cc/8T3Z-BTFM].

20. *See* Freytas-Tamura, *supra* note 9.

21. *See* Protecting the Right to Organize Act, H.R. 842, 117th Cong. § 101(b) (2021). The proposed change to the employee classification test here does not explicitly state that gig economy workers will be classified as employees, but gig economy companies like Uber believe that the bill's proposed change to the labor classification test would harm their business model, which is based on classifying their workers as independent contractors. Nicole Goodkind, *Here's How the PRO Act Would Impact Freelance and Gig Workers*, FORTUNE (Mar. 31, 2021, 10:30 AM), https://fortune.com/2021/03/31/pro-act-freelance-gig-workers/ [https://perma.cc/K3LS-ZVBM].

overturned this legislation in 2020.[22] Massachusetts voters were set to decide on a similar proposal in 2022, but the state's Supreme Judicial Court scrapped the initiative.[23]

Many of the complaints levied against gig economy companies about exploiting labor and extracting money out of communities are levied against the food delivery platforms.[24] These complaints will only become more common as gig economy companies become permanent fixtures in our economy. These issues will be crucial in the future of antitrust law.

This Note will discuss the intersection of antitrust law and labor law in the gig economy space, centered around food delivery platforms. This Note will argue that antitrust enforcers and courts should analyze potential antitrust violations under a "fairness" standard that considers, among other factors, how consolidation of market power affects upstream markets like labor. Part I will recount the history of how antitrust and labor law have interacted, detail the current state of the intersection between the two legal fields, and review the history of the food delivery platforms. It will thus explain how the companies became fixtures in the modern economy and why the industry reflects the overarching issues around antitrust and labor. Part II will discuss three recommendations for updating antitrust law to tackle concerns levied at gig economy companies, each centered around expanding antitrust jurisprudence beyond the consumer welfare standard: (1) expanding the antitrust exemption for labor to include labor in the gig economy; (2) modifying the antitrust analysis that courts conduct beyond the consumer welfare standard by weighing factors such as worker welfare concerns, with weight given to worker welfare depending on the nature of the claim; and (3) weighing worker welfare heavily when performing a merger review to see how a potential merger would create monopsony or monopsony-like control over a labor market.

I. THE HISTORY OF ANTITRUST, LABOR, AND THE FOOD DELIVERY INDUSTRY

Courts analyze alleged violations of modern federal antitrust law under the consumer welfare standard, which measures harm to consumers in the form of

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22. Rebecca Heilweil, *California Has Rejected a Major Gig Economy Reform, Leaving Workers Without Employee Protections*, VOX (Nov. 4, 2020, 3:13 AM), https://www.vox.com/recode/2020/11/4/21539335/california-proposition-22-results-gig-economy-workers [https://perma.cc/H5VE-37F2].

23. Rebecca Bellan, *Massachusetts Court Rejects Ballot to Define Gig Workers as Contractors*, TECHCRUNCH (June 14, 2022, 4:03 PM), https://techcrunch.com/2022/06/14/massachusetts-court-rejects-ballot-to-define-gig-workers-as-contractors/ [https://perma.cc/8ZSY-KWZH].

24. *Compare* Class Action Complaint at 18–20, Davitashvili v. Grubhub Inc., No. 1:20-cv-03000 (S.D.N.Y. filed Apr. 13, 2020) (alleging that the food delivery companies attempted to monopolize the delivery personnel labor market) *with* Class Action Complaint at 21, Gill v. Uber Techs., Inc., No. CGC-22-600284 (Cal. Super. Ct. filed June 20, 2022) (alleging that gig economy rideshare companies possess a duopoly over the rideshare driver labor market).

higher prices or lower output.[25] This standard, in its singular focus on understanding harm to the consumer, does not analyze how potential restrictions and anticompetitive practices harm the labor market.[26] However, antitrust law has a long history of interacting with labor concerns.[27] This Part will summarize that history, discuss the lack of antitrust litigation around labor markets after the passage of the Clayton Act, and discuss a modern trend of antitrust litigation in labor markets. It will then discuss the state of modern labor law, specifically the law around the classification of employees and independent contractors and where gig economy workers fall on that spectrum. Finally, this Part will discuss the history of the food delivery platforms to show how antitrust and labor law intersect in this industry.

A. The History of Antitrust Law in Labor Markets

The first federal antitrust law, the Sherman Act, was enacted in 1890.[28] Section 1 prohibits "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce."[29] This prohibits joint action by competitors to act like a monopoly because their collective decisions and combined market power can result in the reduction of product quantity in the relevant market, leading to an increase in prices and harm to competition.[30] Section 2 establishes penalties against "[e]very person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States."[31] This prohibits any corporation from using its market power to monopolize or attempt to monopolize a market.[32]

Congress passed the Sherman Act primarily due to public anger at "trusts and combinations" that were seen as creating economic oppression.[33] The Sherman Act was designed to sanction business cartels acting in restraint of trade.[34] Although economic thinking around competition was still rudimentary, economists and members of Congress believed that those business cartels and their restraints led to "high prices, limited production, low wages, and losses to small businesses."[35] Surprisingly, most early Sherman Act enforcement actions did not target business

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25. Herbert Hovenkamp, *The Rule of Reason*, 70 FLA. L. REV. 81, 118 (2018) ("In order to assess a restraint under the consumer welfare principle, one need query only whether prices are higher (or output lower) as a result of the restraint.").

26. *See* Iona Marinescu & Herbert Hovenkamp, *Anticompetitive Mergers in Labor Markets*, 94 IND. L.J. 1031, 1032 (2019).

27. *See generally* Herbert Hovenkamp, *Labor Conspiracies in American Law, 1880–1930*, 66 TEX. L. REV. 919 (1988) (analyzing the history of the Sherman Act being used to defeat organized labor activities).

28. *See generally* Sherman Act, 15 U.S.C. §§ 1–2.

29. Sherman Act § 1.

30. *See id.*; N. Pac. Ry. Co. v. United States, 356 U.S. 1, 4 (1958).

31. Sherman Act § 2.

32. *See id.*

33. Barak Orbach, *How Antitrust Lost Its Goal*, 81 FORDHAM L. REV. 2253, 2262 (2013).

34. *See* Hovenkamp, *supra* note 27, at 939 (noting that some economists at the time of the passage of the Sherman Act believed that federal antitrust laws would be harmful because of the positive effects that business cartels had on the economy, such as reducing costs and the threat of work stoppages).

35. Orbach, *supra* note 33, at 2262–63.

cartels, but rather organized labor.[36] In 12 of the first 13 cases interpreting the Sherman Act, courts found antitrust violations involving labor conspiracies.[37] Union leaders argued that Congress did not intend for antitrust laws to apply to organized labor efforts.[38] But courts did not find this argument persuasive, reasoning that Congress debated and rejected amendments to the Sherman Act to exempt labor organizations.[39]

A prominent early instance of Sherman Act enforcement occurred during the Pullman Strike of 1894. The American Railway Union, at the direction of its president, Eugene V. Debs, organized a strike of railway employees against railroad companies that operated Pullman cars in solidarity with a strike against the factory that manufactured Pullman cars.[40] To end the strike, the federal government obtained an injunction against the union and Debs for violating the Sherman Act.[41] The Northern District of Illinois upheld the injunction, holding that multiple unions acting in concert is a combination that can restrain commerce under a broad reading of the Sherman Act.[42] The Supreme Court upheld the injunction on review, but it added that the government's authority stemmed from a much broader mandate to regulate interstate commerce.[43] Thus, it did not discuss the relationship between the Sherman Act and labor unions.[44]

In *Loewe v. Lawlor*, the Supreme Court held that the Sherman Act applied to labor unions.[45] There, the United Hatters of America ("UHU") and the American Federation of Labor ("AFL") organized a strike against D. E. Loewe & Company, a fur hat manufacturer, after the company declared itself an open shop in an attempt to gain recognition as a bargaining agent for employees.[46] The boycott successfully persuaded consumers, retailers, and wholesalers not to do business with Loewe, so the company sued the union for violating the Sherman Act.[47] The Court reasoned that it does not matter if a labor union is not itself engaged in interstate commerce acts (e.g., the transportation of hats).[48] The strike nevertheless obstructed "the free flow of commerce" and the "liberty of a trader to engage in business."[49]

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36. Hovenkamp, *supra* note 27, at 950.
37. *Id.*
38. *Id.*
39. *See, e.g.*, Loewe v. Lawlor, 208 U.S. 274, 301 (1908) ("The records of Congress show that several efforts were made to exempt, by legislation, organizations of farmers and laborers from the operation of the act, and that all these efforts failed."); *see also* Hovenkamp, *supra* note 27, at 950–51 ("Congress fully considered whether to exempt labor but decided that no combinations, either capital or labor, should be exempted.").
40. United States v. Debs, 64 F. 724, 727–29 (C.C.N.D. Ill. 1894).
41. *Id.* at 745.
42. *Id.* at 751–52, 755.
43. *In re* Debs, 158 U.S. 564, 600 (1895).
44. *Id.*
45. 208 U.S. 274, 292 (1908).
46. WILLIAM H. HOLLEY ET AL., THE LABOR RELATIONS PROCESS 48 (11th ed. 2016).
47. *Id.*
48. *Loewe*, 208 U.S. at 301.
49. *Id.* at 293.

This holding deprived labor organizations of an effective bargaining tactic.[50] The decision not only effectively eliminated the use of boycotts but also worried union leaders as to whether courts might extend the *Loewe* holding to other union tactics.[51] These factors, along with the fear that individual union members could be held personally liable for their union's conduct, depressed union membership and hurt collective organizing efforts.[52] This prompted labor organizations and the AFL to lobby political leaders to reverse the Court's implementation of the Sherman Act.[53] In response to this pressure, Congress amended antitrust law with the Clayton Act to specify that "the labor of a human being is not a commodity or article of commerce" and exempted labor organizations and their members from antitrust law.[54] Since the labor exception to antitrust law was codified and after the success of the labor movement in the New Deal era, antitrust litigation in labor markets was virtually nonexistent.[55]

Surprisingly, antitrust litigation in labor markets has increased over the last decade.[56] In 2012, the Northern District of California found technology employees can survive a motion to dismiss on a claim that technology companies violated federal antitrust laws through anticompetitive conduct against labor markets with the use of "no-poach agreements."[57] A no-poach agreement is when two or more competitors agree not to hire employees from each other.[58] When confronted with a no-poach agreement between Apple, Adobe, Intel, and Google, the court found that the alleged facts were sufficient to plead a per se violation of § 1§ 1 of the Sherman Act.[59] This finding was significant because if a court finds that anticompetitive conduct falls into a per se illegal category, the court does not need to analyze the anticompetitive effects of the agreement (in terms of harm to consumers) against the procompetitive justifications.[60]

The early successes of these antitrust cases in labor markets make it likely that the government will prosecute more antitrust violations in labor markets. Since 2016, federal antitrust enforcement agencies have increasingly stated their intent to

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50. HOLLEY ET AL., *supra* note 46, at 48.
51. *Id.*
52. *Id.*
53. *Id.* at 48–49.
54. Clayton Act § 6, 15 U.S.C. § 17 (1996).
55. *See* Eric A. Posner, *Antitrust's Labor Market Problem*, PROMARKET (Nov. 8, 2021), https://promarket.org/2021/11/08/antitrust-labor-market-concentration-problem/ [https://perma.cc/3PJG-A6R9].
56. *See, e.g.*, ERIC A. POSNER, HOW ANTITRUST FAILED WORKERS 33 (2021).
57. *In re* High-Tech Emp. Antitrust Litig., 856 F. Supp. 2d 1103, 1109–11, 1127 (N.D. Cal. 2012) (no-poach litigation brought against Apple, Adobe, Intel, and Google).
58. *See* Alan B. Krueger & Orley Ashenfelter, *Theory of Evidence on Employer Collusion in the Franchise Sector* 4 (Princeton Univ., Working Paper No. 614, 2017), https://dataspace.princeton.edu/jspui/bitstream/88435/dsp014f16c547g/3/614.pdf [https://perma.cc/D5PD-29HP].
59. *In re* High-Tech Employee Antitrust Litigation, 856 F. Supp. 2d at 1122.
60. *See* N. Pac. Ry. Co. v. United States, 356 U.S. 1, 5 (1958).

go after wage fixing and no-poach agreements.[61] This policy change is reflected in practice: the federal antitrust agencies have become increasingly aggressive in pursuing criminal, rather than civil, charges against companies and executives alleged to have fixed wages or limited worker mobility.[62] This change in antitrust enforcement policy has survived and strengthened through three different presidential administrations.[63] In addition to prosecuting wage fixing and no-poach cases, the federal antitrust agencies are publicly discussing ways to better use antitrust laws in the labor market to protect labor rights.[64] Given the increased attention to the antitrust concerns in the labor market, a new standard of evaluating the competition in the labor market is necessary.

B. The Current State of Labor Law for Gig Workers

The rise of the gig economy has produced a significant—and rapidly increasing—American gig workforce.[65] The gig economy generally refers to company-created marketplaces that use internet-connected devices to link potential

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61. U.S. DEP'T OF JUST. ANTITRUST DIV. & FED. TRADE COMM'N, ANTITRUST GUIDANCE FOR HUMAN RESOURCE PROFESSIONALS 4 (2016), https://www.justice.gov/atr/file/903511/download [https://perma.cc/H3HZ-VRJ9] ("Going forward, the DOJ intends to proceed criminally against naked wage fixing or no-poaching agreements."); *see also* U.S. DEP'T OF JUST. ANTITRUST DIV., ANTITRUST DIVISION UPDATE SPRING 2019 (2019), https://www.justice.gov/atr/division-operations/division-update-spring-2019/no-poach-approach [https://perma.cc/DEN9-YYUK] ("[A] naked no-poach agreement is a type of horizontal market allocation that should be assessed under the per se rule.").

62. Valerie Bauman, *Labor Cases Turn Criminal as DOJ Defined New Antitrust Approach*, BLOOMBERG L. (Jan. 3, 2022, 4:29 AM), https://news.bloomberglaw.com/daily-labor-report/labor-cases-turn-criminal-as-doj-defines-new-antitrust-approach [https://perma.cc/CNW9-BMMY].

63. *Id.* ("[A] new era in a Justice Department effort that began under President Barack Obama and continued through the Trump administration into President Joe Biden's.").

64. Press Release, Fed. Trade Comm'n & U.S. Dep't of Just. Antitrust Div., *FTC and DOJ to Hold Virtual Public Workshop Exploring Competition in Labor Markets*, FED. TRADE COMM'N, (Oct. 27, 2021), https://www.ftc.gov/news-events/press-releases/2021/10/ftc-doj-hold-virtual-public-workshop-exploring-competition-labor [https://perma.cc/Q9EQ-P2JC].

65. Monica Anderson et al., *The State of Gig Work in 2021*, PEW RESEARCH CENTER (Dec. 8, 2021), https://www.pewresearch.org/internet/2021/12/08/the-state-of-gig-work-in-2021/ [https://perma.cc/GNF3-EF56] (finding that 16% of Americans have earned money via an online gig platform and that 3% of U.S. adults have listed their main job over the past 12 months as a gig platform worker); AHU YILDIRMAZ ET AL., ADP RSCH. INST., ILLUMINATING THE SHADOW WORKFORCE: INSIGHTS INTO THE GIG WORKFORCE IN BUSINESSES 3, (Feb. 2020), https://www.adp.com/-/media/adp/resourcehub/pdf/adpri/illuminating-the-shadow-workforce-by-adp-research-institute.ashx [https://perma.cc/CF3X-DPAK] (finding that the share of gig workers in companies has increased 15% between 2010 to 2019 and predicting that the share of gig workers in companies will continue to grow); *see also* Marcin Zgola, *Will the Gig Economy Become the New Working-Class Norm?*, FORBES (Aug. 12, 2021, 8:20 AM), https://www.forbes.com/sites/forbesbusinesscouncil/2021/08/12/will-the-gig-economy-become-the-new-working-class-norm/ [https://perma.cc/6B39-ZH8J] ("The gig economy experienced 33% growth in 2020 . . . and 2 million new gig workers emerged in the U.S. in 2020 alone.").

suppliers and customers on a large scale.[66] The dominant food delivery companies describe themselves this way.[67] While some platforms facilitate the sale of assets between suppliers and customers—for example, Airbnb links homeowners interested in renting their homes or spare rooms with those seeking accommodations—other platforms match those who provide *services* with potential customers.[68] At a high level, the food delivery platforms facilitate a transaction between restaurants and consumers,[69] but the transactions are truly facilitated by the delivery personnel who bring the order from the restaurant to the consumer.

There are some economic benefits to the sharing economy.[70] Modern technological advances that enable online platforms to match participants on different sides of a multi-sided platform allow for participants on different sides of the platform to be matched more efficiently.[71] In the food delivery context specifically, a restaurant, a driver, and a customer can be matched in a way that allows the order to reach the customer as quickly as possible.[72] These technological advances also keep transaction costs low.[73] The sharing business model also allows underutilized assets to be put to more productive use, reducing entry costs on the supplier side.[74] For example, it is relatively easy for an individual who owns an underused car to enter the market to deliver food from restaurants to potential customers at times of their own choosing to generate income without incurring many fixed costs.[75] The sharing economy platforms also potentially enhance consumer welfare by improving the customer experience and offering more options.[76] During the early period of the COVID-19 pandemic in 2020, the food delivery platforms nearly doubled their business by allowing customers to "dine out" from the safety

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66. *See* FED. TRADE COMM'N, THE "SHARING" ECONOMY: ISSUES FACING PLATFORMS, PARTICIPANTS & REGULATORS 10–11 (2016), https://www.ftc.gov/system/files/documents/reports/sharing-economy-issues-facing-platforms-participants-regulators-federal-trade-commission-staff/p151200_ftc_staff_report_on_the_sharing_economy.pdf [https://perma.cc/ACS3-Y2W7].

67. *See Who We Are*, DOORDASH, https://www.doordash.com/about/ [https://perma.cc/LA4E-VLKA] (last visited Oct. 27, 2021); *About Us*, GRUBHUB, https://about.grubhub.com/about-us/ [https://perma.cc/2XYX-3DYK] (last visited Oct. 27, 2021); *How Uber Eats Works*, UBER EATS, https://about.ubereats.com/ [https://perma.cc/BR8P-TRX3] (last visited Oct. 27, 2021).

68. *See* FED. TRADE COMM'N, *supra* note 66, at 23–25.

69. *See Who We Are*, *supra* note 67; *About Us*, *supra* note 67*; How Uber Eats Works , supra* note 67.

70. FED. TRADE COMM'N, *supra* note 66, at 11.

71. *Id.* at 19, 24.

72. *See* Ahuja et al., *supra* note 7.

73. FED. TRADE COMM'N, *supra* note 66, at 18.

74. *See id.* at 24; *see also* RUDY TELLES, JR., U.S. DEP'T OF COM., DIGITAL MATCHING FIRMS: A NEW DEFINITION IN THE "SHARING ECONOMY" SPACE 2 (2016), https://www.commerce.gov/sites/default/files/migrated/reports/digital-matching-firms-new-definition-sharing-economy-space.pdf [https://perma.cc/5LWD-RTHG].

75. FED. TRADE COMM'N, *supra* note 66, at 24 (describing a similar utilization of underutilized personal resources in the rideshare industry).

76. TELLES, JR., *supra* note 74, at 11–14 (detailing the benefits of digital matching platforms to consumers).

of their homes while allowing local restaurants to somewhat weather the loss of business from the drop in indoor dining.[77]

Because workers can choose their own hours—which, unlike traditional employment,[78] might leave them free to have additional jobs or professional relationships[79]—some say their status is more in line with that of independent contractors than employees.[80] The major downside to gig economy work, however, is that much of the social safety net in the United States is tied to traditional employment relationships and is available only to employees, not independent contractors.[81] For example, under state and federal laws, employers must pay employees at least a minimum wage[82] and overtime pay for excess work hours;[83] contribute towards an employee's Social Security, Disability Insurance, and Medicare payroll taxes;[84] pay a state's unemployment insurance and workers' compensation insurance;[85] and much more.[86] Additionally, employees, but not independent contractors, are covered by the National Labor Relations Act ("NLRA"), a set of labor laws that protect employees' right to unionize and engage in collective bargaining.[87] Infringements of these labor rights are deemed "unfair labor practice[s]" which can be prosecuted by the National Labor Relations Board ("NLRB"), the agency created to implement the NLRA.[88] The NLRA, however,

77. Sumagaysay, *supra* note 4.

78. TELLES, JR., *supra* note 74, at 12–13 (distinguishing gig economy work from traditional employment because gig work provides workers with flexible schedules and additional income).

79. Seth D. Harris & Alan B. Krueger, *A Proposal for Modernizing Labor Laws for Twenty-First-Century Work: The "Independent Worker"* 9–10 (Hamilton Project, Discussion Paper No. 2015-10, 2015), https://www.hamiltonproject.org/assets/files/modernizing_labor_laws_for_twenty_first_century_work_krueger_harris.pdf [https://perma.cc/685T-MQTM].

80. *See* POSNER, *supra* note 56, at 136–38.

81. *See* Harris & Krueger, *supra* note 79, at 7.

82. *See* Fair Labor Standards Act of 1938, 29 U.S.C. § 206(a)(1).

83. *See id.* § 207(a)(1).

84. *See* 26 U.S.C. § 3111(a) (2018) (setting the tax rate on employers for old-age, survivor, and disability insurance).

85. *See, e.g.*, Cotter v. Lyft, Inc., 60 F. Supp. 3d 1067, 1073–74 (N.D. Cal. 2015) (discussing the protections available for employees, but not independent contractors, in California like workers' compensation and unemployment insurance).

86. For other federal labor and employment laws protecting employees, but not independent contractors, see Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 621–634; Family and Medical Leave Act of 1993, 29 U.S.C. §§ 2601–2654; Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000(e)(1)–(17); Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12101–12213.

87. *See* 29 U.S.C. § 157 ("*Employees* shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection . . . .") (emphasis added).

88. *Id.* § 158.

specifically excludes independent contractors from the definition of employees, so the protections afforded to employees do not extend to independent contractors.[89]

In the rideshare industry—the gig economy sector that has generated the most litigation on the issue of employee classification—no court has yet found Uber or Lyft drivers to be employees.[90] Gig economy workers do not fit well into the traditional definitions of "employees" or "independent contractors."[91] Instead, the relationship between a gig economy and a platform has features resembling both an employee's and independent contractor's relationship with their employer.[92] While there is no uniform test to determine a worker's status under various employment, tax, and other applicable laws, courts use similar factors to determine a worker's employment status.[93] This includes the common law "control test," which assesses the degree of control that a putative employer has over an individual worker.[94] Other relevant factors include whether the work is an integral part of the putative employer's business, the worker's entrepreneurial opportunity, the worker's capital

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89. SuperShuttle DFW, Inc., 367 N.L.R.B. No. 75, at *2 (2019) ("Section 2(3) of the Act . . . excludes from the definition of a covered 'employee' 'any individual having the status of an independent contractor.'"); *see generally* National Labor Relations Act, 29 U.S.C. §§ 153–156 (creating the NLRB and establishing its duties).

90. *See* Saleem v. Corp. Transp. Grp., 854 F.3d 131, 134, 140 (2d. Cir. 2017) (holding that black-car drivers for a car service platform were independent contractors, not employees, because of the extent of the drivers' relationship with the platform, the drivers' ability to form relationships with competing platforms, and the level of control the drivers had over when, where, and how they worked for the platform); McGillis v. Dep't of Econ. Opportunity, 210 So. 3d 220, 225–26 (Fla. Dist. Ct. App. 2017) (holding that Uber drivers are not employees, but independent contractors, because the contract between the parties recognizes the relationship as an independent contractor relationship and the parties' practices reflect the contractual language). A major barrier to lawsuits in this space are arbitration agreements that are contained in contracts between the gig economy platform and their customers and drivers. *See* Meyer v. Uber Techs., Inc., 868 F.3d 66, 70, 80 (2d Cir. 2017) (holding that the plaintiff agreed to arbitrate his claim alleging that the defendant was engaged in a price-fixing scheme with third-party drivers because of a mandatory arbitration clause in defendant's Terms of Service that the plaintiff agreed to). In response to a "'misclassification' of millions of workers," the European Union proposed new legislation which would shift the burden of proof on employment status onto companies rather than the individuals that work for them. Jennifer Rankin, *Gig Economy Workers to Get Employee Rights Under EU Proposals*, GUARDIAN (Dec. 9, 2021, 5:00 AM), https://www.theguardian.com/business/2021/dec/09/gig-economy-workers-to-get-employee-rights-under-eu-proposals [https://perma.cc/P8UB-GALW].

91. *See* Cotter v. Lyft, Inc., 60 F. Supp. 3d 1067, 1069 (N.D. Cal. 2015) (noting that "Lyft drivers don't seem much like employees" while they also "don't seem much like independent contractors either").

92. *See* Harris & Krueger, *supra* note 79, at 9–10 (discussing how gig economy workers are similar and distinct from both employees and independent contractors).

93. *See id.* at 8 tbl.1 (providing a summary of how the employee/independent contractor status is determined under some major federal laws).

94. O'Connor v. Uber Techs. Inc., 82 F. Supp. 3d 1133, 1148–49 (N.D. Cal. 2015) ("[T]he 'principal test of an employment relationship is whether the person to whom service is rendered has the right to control the manner and means of accomplishing the result desired.'" (quoting Ayala v. Antelope Valley Newspapers, Inc., 327 P.3d 165, 171 (Cal. 2014))).

investment, the degree of specialized skill needed to perform the job, and the permanency of the relationship between the individual worker and the putative employer.[95]

Gig economy relationships do not fit well into either classification.[96] Consider food delivery personnel. They resemble independent contractors in that they have complete control over when to work, whether to work at all, how many hours they work, and where they work.[97] They are also free to have other jobs and work relationships, including driving for a competing platform.[98] Having this type of personal control over one's work arrangement is inconsistent with being an employee.[99] Further, the worker's relationship with the platform is typically not as dependent or permanent as traditional employer–employee relationships.[100]

However, food delivery personnel are like employees in that the platform exerts control over some important aspects of their work. The platforms, not the delivery people, set the fares that are charged to customers.[101] Delivery personnel must comply with rules set by the platforms regarding insurance, safety, and service.[102] Delivery drivers have minimal entrepreneurial opportunities in their

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95. *See* Harris & Krueger, *supra* note 79, at 8 tbl.1.

96. POSNER, *supra* note 56, at 156 ("Gig-economy workers float somewhere between the traditional employee and the traditional contractor.").

97. *See Why Deliver with DoorDash*, DOORDASH, https://www.doordash.com/dasher/signup/ [https://perma.cc/W4GU-VYTR] (last visited Jan. 28, 2022); *Grubhub for Drivers*, GRUBHUB, https://driver.grubhub.com/ [https://perma.cc/W65C-TLGG] (last visited Jan. 28, 2022); *Looking for Delivery Driver Jobs?*, UBER, https://www.uber.com/us/en/deliver/ [https://perma.cc/QF7X-BBRD] (last visited Jan. 28, 2022).

98. *See* Jeffrey Fike, *Driving for Multiple Food Delivery Apps at Once [Multi-Apping]*, RIDESHARE GUY (July 29, 2022), https://therideshareguy.com/how-to-drive-for-multiple-delivery-apps/ [https://perma.cc/6S6C-KQPP].

99. McGillis v. Dep't of Econ. Opportunity, 210 So. 3d 220, 226 (Fla. Dist. Ct. App. 2017) ("[I]t is hard to imagine many employers who would grant this level of autonomy to employees permitting work whenever the employee has a whim to work, demanding no particular work be done at all . . . and permitting work for direct competitors."). Food delivery personnel have similar relationships to their platforms as the delivery drivers in *McGillis.*

100. *See* Harris & Krueger, *supra* note 79, at 8 ("But their relationships with intermediaries are not so dependent, deep, extensive, or long lasting that we should ask these intermediaries to assume responsibility for all aspects of independent workers' economic security.").

101. *See* Noah Lichtenstein, *The Hidden Cost of Food Delivery*, TECHCRUNCH (Mar. 16, 2020, 6:53 PM), https://techcrunch.com/2020/03/16/the-hidden-cost-of-food-delivery/ [https://perma.cc/V3JN-NJLG].

102. *See Requirements for Dashing*, DOORDASH, https://help.doordash.com/dashers/s/article/Requirements-for-Dashing [https://perma.cc/Z7VH-YJ27] (last visited Jan. 28, 2022); *What Are the Requirements for Partnering with Grubhub*, GRUBHUB (last visited Jan. 28, 2022), https://driver-support.grubhub.com/hc/en-us/articles/360029692891-What-are-the-requirements-for-partnering-with-Grubhub [https://perma.cc/5SXR-SNX8] (last visited Jan. 28, 2022); *Looking for Delivery Driver Jobs?*, *supra* note 97.

relationship with the platform.[103] The best way for workers to make additional profits is for them to work longer hours, which is atypical for independent contractors.[104]

The gig economy, through food delivery platforms, has offered consumers easier access to local restaurants.[105] It has also offered workers opportunities for income and greater flexibility, but the workers in these relationships receive none of the usual benefits available to employees.[106] Workers in this industry should obtain a share of the surplus generated by the model's efficiencies.

C. History of the Food Delivery Industry

The dominant food delivery companies were founded to take advantage of the then-new internet to connect consumers with local restaurants.[107] Generally, these companies launched in a single city or locality.[108] DoorDash, for example, operated solely in Palo Alto.[109] The companies' success, along with increasing investment in companies that operated online platforms, made the food delivery companies an attractive investment.[110] As a result, they acquired large amounts of venture capital financing.[111] With these additional funds, the companies expanded into other markets and increased their presence across the United States.[112]

Leveraging private equity financing to create a new delivery operation in another city was not the only way the companies expanded. Food delivery companies with strong capital reserves often acquired established food delivery companies in a new market, thereby expanding into a new market without spending

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103. *See* Brett Helling, *11 Unique Tricks to Earn More Money as a Postmates Courier*, RIDESTER (Apr. 22, 2022), https://www.ridester.com/postmates-courier-maximize-earnings/ [https://perma.cc/S3FN-M6R3] (suggesting strategies to maximize delivery earnings such as signing up for multiple delivery services, delivering multiple orders at once, and auto accepting orders).

104. *See id.* (suggesting strategies to maximize delivery earnings such as signing up for multiple delivery services, delivering multiple orders at once, and auto accepting orders).

105. *See supra* text accompanying notes 71–77.

106. *See* Harris & Krueger, *supra* note 79, at 6–7.

107. *See Feeding a Need: Todd Arky '98 Finds Ways in Both the For-Profit and Nonprofit Worlds to Help Children*, NYU LAW NEWS (Dec. 13, 2019), https://www.law.nyu.edu/news/todd-arky-sharebite-experience-camps-social-entrepreneurship-startup [https://perma.cc/9EGP-RQZX].

108. *See* Leena Rao, *Food Delivery Service GrubHub Secures $2 Million in Series B Funding*, TECHCRUNCH (Mar. 23, 2009, 12:49 PM), https://techcrunch.com/2009/03/23/food-delivery-service-grubhub-secures-2-million-in-series-b-funding/ [https://perma.cc/3R4J-A667].

109. Stephen Levy, *DoorDash Wants to Own the Last Mile*, WIRED (Nov. 8, 2015, 12:00 AM), https://www.wired.com/2015/11/doordash-wants-to-own-the-last-mile/ [https://perma.cc/BK43-N2CU].

110. *See* Rao, *supra* note 108; Tyler Sonnemaker, *Venture Capitalists Reveal the Startups that Changed Everything in the Past Decade*, INSIDER (May 2, 2020, 1:10 PM), https://www.businessinsider.com/startups-that-changed-2010s-uber-shopify-stripe-2019-12 [https://perma.cc/2F2V-Q9GE].

111. *See id.*

112. *See id.*

the capital to build a new operation from the ground up.[113] For example, in 2015, Grubhub, which at the time primarily operated in the eastern and midwestern United States, acquired Delivered Dish, a Portland-based company that operated in several cities in the western United States.[114] Acquisitions also allow companies entering a market to avoid competition when building connections with restaurants and to acquire delivery driver labor from established delivery companies.[115]

After the merger between Postmates and Uber Eats, 99% of the food delivery market became concentrated in just three companies,[116] meaning that the food delivery industry is an oligopolistic market.[117] Today, only three companies are buying food delivery personnel labor.

Economists have grown concerned with how corporate concentration and anticompetitive business practices have harmed worker welfare.[118] Mobility in a job market gives employees earning power through seeking out better positions at different companies.[119] A lack of healthy competition for labor in highly concentrated markets stagnates employee growth and depresses wages generally.[120] While research on how corporate concentration affects labor is in its infancy, early studies have shown that the average American labor market is highly

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113. *See* Laura Foreman, *What DoorDash Builds, Uber Buys*, WALL ST. J. (June 25, 2021, 7:03 AM), https://www.wsj.com/articles/what-doordash-builds-uber-buys-11624618980 [https://perma.cc/F4XV-H6CL]; Shira Oide, *GrubHub and Seamless Create Combo Platter*, WALL ST. J. (May 20, 2013, 7:01 PM), https://www.wsj.com/articles/SB10001424127887324787004578495411888526172 [https://perma.cc/2RP7-T2HN]; Amina Elahi, *GrubHub Acquires Delivered Dash of Portland, Ore.*, CHICAGO TRIB. (Dec. 7, 2015, 5:43 PM), https://www.chicagotribune.com/business/blue-sky/ct-grubhub-acquires-delivered-dish-bsi-20151207-story.html [https://perma.cc/XJL7-WPQL].

114. Elahi, *supra* note 113.

115. *See* U.S. DEP'T OF JUST. ANTITRUST DIV. & FED. TRADE COMM'N, VERTICAL MERGER GUIDELINES 5 (2020), https://www.ftc.gov/system/files/documents/public_statements/1580003/vertical_merger_guidelines_6-30-20.pdf [https://perma.cc/2SVL-F4K8] (discussing how the federal antitrust agencies look at whether a merger reduces actual or potential competition when reviewing a merger). The FTC revoked these merger guidelines after finding that the guidelines were based on unsound economic theories and are working to issue new vertical merger guidelines. Press Release, Fed. Trade Comm'n, Federal Trade Commission Withdraws Vertical Merger Guidelines and Commentary (Sept. 15, 2021), https://www.ftc.gov/news-events/news/press-releases/2021/09/federal-trade-commission-withdraws-vertical-merger-guidelines-commentary [https://perma.cc/C2FQ-8CNY].

116. Perri, *supra* note 16.

117. *See* INVESTOPEDIA, *supra* note 17.

118. *See generally* POSNER, *supra* note 56 (arguing that the failure of antitrust to challenge labor-market misbehavior has had a negative effect on wage levels, economic growth, and inequality).

119. *See* Orly Lobel, *Gentlemen Prefer Bonds: How Employers Fix the Talent Market*, 59 SANTA CLARA L. REV. 663, 685–86 (2020).

120. *See* POSNER, *supra* note 56, at 17–19; Krueger & Ashenfelter, *supra* note 58, at 17–18.

concentrated.[121] This research has also shown a correlation between concentrated markets and lower real wages.[122]

Because of the labor concerns in the food delivery industry and gig industries generally, the food delivery labor market appears to be a good test case for litigation around labor in the gig economy. Arbitration clauses in employment contracts prevent food delivery personnel from bringing antitrust claims against the platforms; so far, these arbitration clauses have been upheld.[123] Other technology companies, however, have been ending their use of arbitration clauses with their workers and customers due to organized labor activity and the increasing costs of arbitration.[124] Food delivery companies could follow other technology companies in removing arbitration agreements and allowing claims against them to be heard in court.

With concerns about each company's path to profitability in the industry's current state, future mergers involving the dominant platforms are likely. While the three food delivery companies currently appear successful, there are strong concerns about their long-term profitability.[125] Some industry analysts doubt the companies' long-term viability because it took a pandemic for these companies to become profitable.[126] Additionally, some analysts believe that these companies are not profitable by design; rather, analysts believe that they are designed to be bailed out by venture capital firms until they can achieve a high level of market concentration.[127] Because the best path to profitability for food delivery companies is to increase fees on local businesses after gaining market dominance, the

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121. José Azar et al., *Labor Market Concentration* 11–12 (Nat'l Bureau of Econ. Rsch., Working Paper No. 24147, 2019), https://www.nber.org/system/files/working_papers/w24147/w24147.pdf [https://perma.cc/SEX2-SUGQ] (finding that the average American labor market is highly concentrated under the HHI formula that federal antitrust regulators use to measure industry concentration).

122. *Id.* at 15.

123. McGrath v. DoorDash, Inc., No. 19-cv-05279-EMC, 2020 WL 6526129, at *12 (N.D. Cal. Nov. 5, 2020) (granting the defendant's motion to compel arbitration in an unfair labor practice claim because of an arbitration clause contained in the contract between the plaintiffs and defendant).

124. *See* Daisuke Wakabayashi, *Google Ends Forced Arbitration for All Employee Disputes*, N.Y. TIMES (Feb. 21, 2019), https://www.nytimes.com/2019/02/21/technology/google-forced-arbitration.html; Sara Randazzo, *Amazon Faced 75,000 Arbitration Demands. Now It Says: Fine, Sue Us*, WALL ST. J. (June 1, 2021, 7:30 AM), https://www.wsj.com/articles/amazon-faced-75-000-arbitration-demands-now-it-says-fine-sue-us-11622547000 [https://perma.cc/JU3E-W8G5].

125. *See* Emily Graffeo, *DoorDash is the 'Most Ridiculous IPO of 2020' and Holds No Value Beyond Bailing out Private Investors*, BUSINESSINSIDER (Dec. 7, 2020, 12:45 PM), https://markets.businessinsider.com/news/stocks/doordash-ipo-most-ridiculous-david-trainer-bailing-out-private-investors-2020-12 [https://perma.cc/34N3-J2ND].

126. *See id.*

127. *See* Bijan Stephen, *A Pizzeria Owner Made Money by Buying His Own $24 Pizzas from DoorDash for $16*, THE VERGE (May 18, 2020, 2:15 PM), https://www.theverge.com/2020/5/18/21262316/doordash-pizza-profits-venture-capital-the-margins-ranjan-roy [https://perma.cc/SXL4-MUT6].

companies are more likely to engage in mergers to achieve dominance than to compete.[128]

II. THE CASE FOR NEW ANTITRUST STANDARDS

Since the late 1970s, courts have conducted their antitrust analyses under the consumer welfare standard, which looks at whether the challenged business practices harm consumers by raising prices or lowering the quantity of product produced.[129] This standard has come under heavy criticism in the past decade because, in solely focusing on the downstream effects that harm consumers' wallets, the standard fails to recognize certain forms of anticompetitive harm.[130] The standard has reduced competition, which harms consumers by stifling product quality, variety, and innovation.[131] Two of the most notable critics of the consumer welfare standard, Lina Khan and Jonathan Kanter, were recently appointed to lead the Federal Trade Commission ("FTC") and the Department of Justice ("DOJ") Antitrust Division, where they will have the power to set new standards in antitrust compliance and enforcement.[132] In their short time leading the agencies, they have continued previous administrations' progress by bringing antitrust litigation to labor markets, and they have looked to expand antitrust enforcement for worker

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128. *See* Chloe Sorvino, *Uber's Grubhub Play: A Desperate Bid to Save a Business Everyone Hates*, FORBES (May 13, 2020, 11:18 AM), https://www.forbes.com/sites/chloesorvino/2020/05/13/ubers-grubhub-play-a-desperate-bid-to-save-a-business-everyone-hates/#279f0c304389 [https://perma.cc/H8CB-E7F5].

129. *See generally* ROBERT BORK, THE ANTITRUST PARADOX (1978). The Supreme Court began adopting Bork's ideas in 1977. *See* Continental T. V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 54–57 (1977). In *GTE Sylvania*, the Court held that non-price-setting vertical arrangements were not per se antitrust violations but should be analyzed under the rule of reason. *Id.* at 59. The Court reasoned that certain non-price, vertical restrictions allowed manufacturers to achieve certain efficiencies in the distribution of their products, which could be passed on as savings to the consumer. *Id.* at 54–56 (citing Robert Bork, *The Rule of Reason and the Per Se Concept: Price Fixing and the Market Division (II)*, 75 YALE L.J. 373, 403 (1966)). The Supreme Court definitively adopted Bork's standard in 1979 when the Court declared that "Congress designed the Sherman Act as a 'consumer welfare prescription.'" Reiter v. Sonotone Corp., 442 U.S. 330, 343–44 (1979) (quoting BORK, *supra*, at 66). This statement by the Court is widely viewed as erroneous. *See, e.g.*, Barak Orbach, *Foreword: Antitrust's Pursuit of Purpose*, 81 FORDHAM L. REV. 2151, 2152 (2013).

130. *See* Lina M. Khan, *Amazon's Antitrust Paradox*, 126 YALE L.J. 710, 737 (2017); Masha Abarinova, *Advocates for Antitrust Enforcement Say Consumer Welfare Standard Only One Layer of Competition Law*, BROADBANDBREAKFAST (Dec. 6, 2019), https://broadbandbreakfast.com/2019/12/advocates-for-antitrust-enforcement-say-consumer-welfare-standard-only-one-layer-of-competition-law/ [https://perma.cc/YU6N-63J9].

131. *See* Khan, *supra* note 130, at 737–39; *see also* Abarinova, *supra* note 130.

132. David McCabe & Cecilia Kang, *Biden Names Lina Khan, a Big-Tech Critic, as F.T.C. Chair*, N.Y. TIMES (June 17, 2021), https://www.nytimes.com/2021/06/15/technology/lina-khan-ftc.html [https://perma.cc/42N8-9PN2]; Lauren Feiner, *Senate Confirms Big Tech Critic Jonathan Kanter to Lead DOJ Antitrust Division*, CNBC (Nov. 16, 2021, 8:30 PM), https://www.cnbc.com/2021/11/16/senate-confirms-jonathan-kanter-to-lead-doj-antitrust-division.html [https://perma.cc/93H5-8STH].

welfare.[133] Additionally, the Supreme Court has expressed concerns about how monopsonies in the labor market can lead to antitrust issues such as price-fixing.[134]

One reason why antitrust enforcers and courts want to shift away from the consumer welfare standard and consider competition in labor markets is that the narrow focus of the standard does not reflect the legislative intent behind federal antitrust laws.[135] Members of the 51st Congress passed the Sherman Act to address the "trusts problem," which included concerns about high prices, but also about "restraints of trade, . . . limited production, *low wages*, losses to small businesses, and other forms of perceived economic oppression."[136] A concern about how combinations of capital could control and restrain industry, affecting labor, was also reflected in an early antitrust case *United States v. Trans-Missouri Freight Association*, where the Court cited that concern as one reason to apply the Sherman Act to railroad companies.[137] While economic thinking around competition was in a rudimentary form when the Sherman Act passed, Congress clearly intended for the Act to protect competition and to lead to better wages for workers, not just to ensure low prices for consumers.[138]

The Sherman Act's original intent can justify reshaping the goals of antitrust laws to promote "fairness," which condemns excessive profit-seeking and views efforts to acquire market power as a source of undesirable distributive effects.[139] The fairness vision, which harkens back to the goals of the New Deal, is premised on the assumption that large businesses and vertical restraints exclude competition and that horizontal arrangements tend to be collusive.[140] The goal of courts and antitrust prosecutors in the post-New Deal era was to protect small businesses and individual economic liberty against the harms of anticompetitive action and corporate excess.[141] This vision has dominated the public conversation since the Great Recession of 2007–2008 due to the rise of technology platforms, which parallels economic trends in the Gilded Age.[142] While it has not yet influenced the direction of antitrust policy, statements by federal antitrust agency leaders suggest a shift towards the fairness vision.[143]

Reviewing how anticompetitive practices affect the labor market is in line with this fairness vision of antitrust law and is supported by the original intent of the Sherman Act.[144] This Note proposes that, in line with this new vision, review of antitrust practices should move away from a sole focus on consumer welfare and

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133. *See supra* text accompanying notes 61–64.

134. Nat'l Collegiate Athletic Ass'n v. Alston, 141 S. Ct. 2141, 2167–68 (2021) (Kavanaugh, J., concurring).

135. *See* Khan, *supra* note 130, at 737.

136. Orbach, *supra* note 33, at 2262 (emphasis added).

137. 166 U.S. 290, 323–25 (1897).

138. *See* Orbach, *supra* note 33, at 2262–64.

139. Barak Orbach, *The Present New Antitrust Era*, 60 WM. & MARY L. REV. 1439, 1441 (2019).

140. *Id.* at 1450–52.

141. *Id.* at 1452–53.

142. *Id.* at 1458.

143. *See id.*

144. *See* Orbach, *supra* note 33, at 2262.

consider other factors such as worker welfare. To achieve this, courts should expand the antitrust labor exemption to include gig economy workers. Courts should also weigh how the challenged business practices will affect labor as part of a claim brought under the Sherman Act, with weight given to worker welfare depending on the nature of the case. This Note also advises federal antitrust agencies to weigh effects on worker welfare as a major factor when reviewing a proposed merger. I use the food delivery industry as a case study to detail how potential claims might fare under these new standards.

A. Expand the Antitrust Labor Exemption to Include Gig Workers

Congress implemented the antitrust labor exemption in the Clayton Act due to backlash from early antitrust prosecution being primarily directed at organized labor activities.[145] This exemption allows collective action by employees to achieve its basic goal: to remedy the imbalance of power that exists between employees and their employers in typical employment relationships.[146] Federal law seeks to remedy this imbalance through other statutes as well.[147] The NLRA, however, specifically excludes independent contractors from its coverage.[148] Likewise, the antitrust labor exemption has been held inapplicable to independent contractors.[149] This Note proposes expanding the antitrust labor exemption to workers in the gig economy because: (1) gig economy workers do not share attributes of independent contractors that justify their exclusion from the antitrust labor exemption;[150] and (2) expanding the exemption can remedy the imbalance of power that exists between gig economy workers and their platforms.[151]

The Supreme Court excluded independent contractors from the antitrust labor exemption relatively soon after the NLRA's enactment.[152] In *Columbia River Packers Association v. Hinton*, the Court held that the antitrust labor exemption did not apply to independent businesspeople who joined unions and, through their unions, coordinated the prices at which they would sell their products and services to commercial buyers.[153] The Court saw the case as no more than a dispute among businesspeople, reasoning that the antitrust labor exemption "was not intended to

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145. *See supra* text accompanying notes 50–54.

146. *See* National Labor Relations Act § 1, 29 U.S.C. § 151 ("The inequality of bargaining power between employees . . . and employers . . . substantially burdens . . . commerce . . . by depressing wage rates and the purchasing power of wage earners . . . .").

147. *See supra* text accompanying notes 81–89.

148. *See* 29 U.S.C. § 157 ("*Employees* shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection . . . .") (emphasis added).

149. Columbia River Packers Ass'n v. Hinton, 315 U.S. 143, 145 (1942); Los Angeles Meat & Provision Drivers Union, Local 626 v. United States, 371 U.S. 94, 101 (1962).

150. *See supra* text accompanying notes 96–104.

151. *Id.*

152. *Hinton*, 315 U.S. at 145.

153. *Id.* at 144–45.

have applications to disputes over the sale of commodities."[154] The Court affirmed this holding 20 years later in *Los Angeles Meat & Provision Drivers Union, Local 626 v. United States*, where unionized independent middlemen who sold restaurant grease to producers threatened boycotts if the processors did business with non-union businesspeople.[155]

After the antitrust labor exemption was enacted, courts found antitrust liability in cases involving organized action by groups of independent professionals such as engineers,[156] medical professionals,[157] and even lawyers.[158] The common factor underlying these cases is that the groups in question truly were comprised of independent businesspeople.[159] Arguably, condoning these actions is like condoning a cartel of suppliers.

Gig economy workers do not exhibit the characteristics associated with those groups of independent contractors.[160] They are not truly independent. They have limited entrepreneurial opportunities and are subject to heavy rules and regulations enacted by the platform for which they work. They lack the autonomy that independent businesspeople had in cases where antitrust violations were found in actions by groups of professionals. They also do not generally compete against each other. This type of labor categorization fits squarely into the exception that Congress intended with the passage of Clayton Act § 6.

Today, the line separating employees and independent contractors is often blurred. Workers such as food delivery personnel have substantial flexibility over certain aspects of their work. They have sole control over which platform(s) to work for, when and where to work, and how often they want to deliver food for the platform. These workers are nevertheless subject to the platform's control over certain important aspects of their work. Food delivery workers are indirectly supervised in the form of customer ratings. The platform sets the fares that customers pay and the wages given out to the delivery personnel. Essentially, food delivery workers are exposed to vulnerabilities in their relationship with a platform like those of employees in an employment context. Like employees, they lack individual leverage in negotiating with a platform over the terms of their relationship.

Extending the antitrust labor exemption to gig economy workers, such as food delivery personnel, therefore would be consistent with the philosophy underlying the extension. It would allow gig economy workers to aggregate their bargaining power to negotiate with the platform for appropriate benefits and compensation. Food delivery personnel can, for example, threaten a strike against the platform to obtain a more favorable revenue split, benefits such as

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154. *Id.* at 145.
155. 371 U.S. 94, 97, 101 (1962).
156. Nat'l Soc'y of Pro. Eng'rs v. United States, 435 U.S. 679, 681 (1978).
157. FTC v. Ind. Fed'n of Dentists, 476 U.S. 447, 465–66 (1986).
158. FTC v. Superior Ct. Trial Laws.' Ass'n, 493 U.S. 411, 431–32 (1990).
159. *See Nat'l Soc'y of Pro. Eng'rs*, 435 U.S. at 692; *Ind. Fed'n of Dentists*, 476 U.S. at 463; *Superior Ct. Trial Laws.' Ass'n*, 493 U.S. at 422–23.
160. *See supra* text accompanying notes 101–04.

reimbursement for gas and car maintenance, or even payroll tax contributions for Social Security and Medicare.

While this Section focuses on expanding the antitrust labor exemption to delivery workers, there are proposals to update labor laws to expand the employee classification at the federal and state levels. The major proposed federal legislation that would impact food delivery workers is the PRO Act.[161] The relevant portion of the Act would change the test to determine whether a worker is an employee or an independent contractor for union organizing purposes.[162] The test mirrors a former test used in California to determine whether a worker is an employee or an independent contractor, which determined that rideshare drivers for Uber and Lyft were considered employees, not independent contractors.[163] However, the law seems unlikely to pass in the short term, given limited movement of the legislation since it passed the House of Representatives in March of 2021.[164] Employee classification efforts at the state level have not fared much better. The passage of Proposition 22 in California dashed hopes of employee classification in the state.[165] Massachusetts was set to vote on a similar measure in 2022 before the state's Supreme Judicial Court threw out the initiative.[166] Because current legislative proposals to recategorize gig economy workers into an employee category seem unviable, the best approach to improve worker welfare is to expand the antitrust labor exemption to cover gig economy workers until the legislative process resolves this issue at its trademark deliberate and efficient speed.

A potential issue with this proposal is that the cost of an increased revenue share for delivery labor will be passed onto consumers. Even if companies impose a cost increase on consumers, small food delivery companies or restaurants offering their own delivery services can capitalize on the cost increase to promote their own operations. This would stimulate competition in the food delivery market, which is precisely the goal of antitrust laws. Still, Congress weighed the tradeoff between consumer welfare, marketplace competition, and worker welfare when it passed the antitrust exemption for labor,[167] so courts should ignore a theoretical price increase in food delivery fees when considering whether to expand the exemption.

Expanding the antitrust labor exemption would be an imperfect solution. Ultimately, it does not automatically give food delivery workers the social safety net that federal and state laws guarantee for employees. It also does not provide gig economy workers with the same enforcement mechanisms that workers have under the NLRA. It asks food delivery workers to risk their earnings to fight for protections that employees, who have similar relationships with their employers as gig economy workers do with their platforms, already have. However, it is a solution that can be

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161. Protecting the Right to Organize Act, H.R. 842, 117th Cong. § 101(b) (2021).
162. *Id.*
163. Goodkind, *supra* note 21.
164. Eric Maus, *The PRO Act Gets New Life with Build Back Better Act*, CITIZENS AGAINST GOVERNMENT WASTE: THE WASTEWATCHER (Dec. 14, 2021), https://www.cagw.org/thewastewatcher/pro-act-gets-new-life-build-back-better-act [https://perma.cc/TRA5-PVJC].
165. Heilweil, *supra* note 22.
166. Bellan, *supra* note 23.
167. *See* Orbach, *supra* note 33, at 2263–64.

readily implemented as soon as an antitrust case in a labor market enters a court while legislatures formulate a better solution to this problem.

B. Consider Worker Welfare Concerns in Sherman Act Claims

While some claims challenging anticompetitive restrictions on labor markets can be brought under the Sherman Act,[168] the singular focus on consumer welfare means that courts do not analyze the upstream effects of challenged anticompetitive business practices.[169] With an increasing likelihood of Sherman Act claims being brought in labor markets[170] and a public desire to shift to a fairness vision of antitrust laws,[171] courts likely will grapple with how to weigh labor considerations when evaluating Sherman Act claims. This Note proposes that this should depend on the nature of the claim, with more weight given to worker welfare if the claim concerns anticompetitive practices in labor markets and less weight when consumers claim an antitrust injury.

Antitrust standing is not coextensive with Article III standing,[172] but a plaintiff must also prove "antitrust injury," meaning an injury of the type that antitrust laws were intended to prevent and that flows from the defendant's alleged unlawful conduct.[173] In addition, plaintiffs must prove that they bore the direct harms of the anticompetitive conduct.[174] This doctrine of antitrust standing limits what cases can be brought to court. This Note does not discuss the merits of this narrow standing doctrine, but the doctrine likely means that consumers cannot bring antitrust claims alleging harm to the labor market in that industry. Likewise, workers likely cannot bring antitrust claims against the platform alleging consumer harm.

In this Note's proposal, the weight given to worker welfare should depend on the nature of the claim. If a claim alleges anticompetitive conduct in a labor market, worker welfare should be weighed as the primary factor in determining antitrust liability. If consumers bring a claim where the alleged injury is higher prices or lower output, worker welfare should not be weighed heavily, if at all. In claims between these two extremes, such as claims brought by government enforcers, the weight given to worker welfare should correlate with the degree of alleged harm to workers. This Note does not argue that an antitrust analysis should ignore consumer welfare, but the weight that courts and antitrust enforcers give to factors other than worker welfare exceeds this Note's scope.

Worker welfare should be the primary factor that courts consider in claims that allege anticompetitive conduct in a labor market. Take a hypothetical claim by food delivery drivers against Grubhub alleging anticompetitive conduct in the New York City market to acquire and maintain a monopoly of the food delivery labor

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168. *See supra* text accompanying notes 56–60.

169. Lina M. Khan, *The New Brandeis Movement: America's Antimonopoly Debate*, 9 J. EUR. COMPETITION L. & PRAC. 131, 132 (2018).

170. *See supra* text accompanying notes 56–60.

171. *See* Orbach, *supra* note 139, at 1458.

172. *See* U.S. CONST. art. III. Courts have created a test to determine whether a plaintiff has met the bare minimum constitutional requirement of standing. *See, e.g.*, Lujan v. Defs. of Wildlife, 504 U.S. 555, 560–61 (1992).

173. Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 489 (1977).

174. *Id.*

market in that region.[175] In this hypothetical, Grubhub engaged in a predatory pricing-type scheme whereby it acquired labor by offering better wages to existing delivery workers and then cut wages to lower levels as soon as Grubhub's competition in the labor market was destroyed. Under the rule of reason framework used to evaluate most antitrust claims,[176] this claim will likely fail. The plaintiffs likely cannot meet the initial burden of proving that the challenged restraint has a substantial anticompetitive effect that harms consumers in the relevant market.[177] Using the consumer welfare standard, a court could easily find that the challenged conduct benefits consumers because the efficiencies created by controlling the labor market can be passed on as savings to the customers.

However, if worker welfare was weighed as the primary factor, the plaintiffs in the hypothetical might be able to win a § 2 claim alleging monopolization of a labor market. While predatory pricing is difficult to prove,[178] the standard becomes easier for the plaintiffs when worker welfare is considered a primary factor. Additionally, much of the logic behind the standard of proof in a predatory pricing scheme is based on a narrow consumer welfare focus.[179] Considering worker welfare factors in a predatory pricing scheme to control the labor market would make a claim easier for labor plaintiffs to win because a court using this new standard would be concerned about how the monopoly power exercised by the defendants depressed worker wages.[180]

On the other extreme are claims brought by consumers where the alleged injury is higher prices or lowered output. A hypothetical example is a claim brought against food delivery companies alleging restrictive contract provisions and an abuse of market power that harms consumers in the form of higher prices.[181] While this claim might allege harm to the food delivery labor market, the primary harm that stems from the alleged anticompetitive conduct is higher prices for the

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175. Grubhub controls close to 86% of the food delivery market in New York City when measured by sales. Rani Molla, *What's the Biggest Food Delivery Service in Your City?*, VOX: RECODE (Oct. 3, 2017), https://www.vox.com/2017/10/3/16384050/food-delivery-service-ubereats-grubhub-doordash-city-takeout [https://perma.cc/VHQ9-PSB8]. Though there is not research that shows a correlation between market share measured by total consumer sales and control over labor in the food delivery market, the company with the majority of sales likely controls a majority of the labor.

176. Ohio v. Am. Express Co., 138 S. Ct. 2274, 2284 (2018).

177. *See id.*

178. *See* Brooke Grp. Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 226 (1993). In *Brooke Group*, the Court held that the plaintiffs failed to prove a predatory pricing claim against the defendant because they failed to show that the defendant could successfully execute the scheme. *Id.* at 230–31. The Court reasoned that predatory pricing schemes were implausible and that plaintiffs needed to show that the scheme would cause a rise in prices above a competitive level to recoup the losses suffered in executing the scheme. *Id.* at 231–32, 239.

179. *See* Khan, *supra* note 130, at 730.

180. *See* POSNER, *supra* note 56, at 71.

181. Complaints against food delivery companies by consumers alleging this type of harm from anticompetitive conduct have been in federal court. *See* Class Action Complaint at 3–4, Davitashvili v. Grubhub Inc., No. 1:20-cv-03000 (S.D.N.Y. filed Apr. 13, 2020).

consumer.[182] If a claim asks for remedies to correct the injury to consumer welfare, then courts should consider consumer welfare as the primary factor when determining whether the harm existed and, if so, how the court should remedy it. Worker welfare could be considered depending on the severity of the remedy (e.g., to determine the impact of a structural remedy),[183] but less weight, if any, should be given to the worker welfare factor in a narrow, consumer-welfare-focused claim.

The issue of how to weigh worker welfare concerns becomes more challenging when plaintiffs can plead more than the narrow set of harms that they suffer. An example is when the government sues firms to prevent them from using unfair practices to unreasonably restrain competition.[184] As an antitrust enforcer, the government can use courts to "prevent and restrain" antitrust violations.[185] And unlike private plaintiffs, a government plaintiff has a powerful statutory authority to seek broad relief to remedy all the anticompetitive harms suffered by the public.[186] If courts shifted away from a narrow consumer welfare standard of analyzing alleged anticompetitive conduct, this broad authorization allows the government to bring claims alleging harm to consumer and worker welfare. Under this scenario, the weight given to worker welfare considerations should depend on the extent of the harm alleged in the complaint and how much the requested remedies would impact worker welfare. If the government files a complaint against food delivery companies alleging that their anticompetitive actions led to an increase in prices for consumers and a decrease in wages for the delivery personnel, courts should weigh both

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182. *See id.* at 18–19. While only harm to consumer welfare is being alleged in the complaint, it must allege that the platform's anticompetitive conduct harmed every side of a multi-sided market under current precedent. *See* Ohio v. Am. Express Co. (*Amex*), 138 S. Ct. 2274, 2285-86 (2018). In *Amex*, the Court held that for a plaintiff to meet their burden under the first step of a rule of reason analysis, they need to show that the defendant's anticompetitive conduct harmed both sides of a two-sided market. *Id.* at 2287. The Court reasoned that in credit-card markets, credit card companies cannot make a sale unless both sides of the platform simultaneously agree to use their services thus exhibiting indirect network effects and interconnecting pricing and demand. *Id.* at 2286. The Court further reasoned that an evaluation of credit card markets must consider both sides of the market because a competing credit card company cannot compete with the defendants if their platform only has merchants without any consumers or vice-versa. *Id.* at 2287. Cases involving multi-sided markets following *Amex* have applied the precedent to two-sided markets outside the credit card industry like mobile app stores. *See* Epic Games, Inc. v. Apple, Inc., No. 4:20-cv-05640-YGR, 2021 WL 4128925, at *1016 (N.D. Cal. Sept. 10, 2021).

183. Structural remedies, as opposed to enjoining the offensive issue, include remedies such as divesture of the defendant or defendants and possibly breaking up a company. *See* Standard Oil Co. of N.J. v. United States, 221 U.S. 1, 80–81 (1911). Courts are typically reluctant to impose structural remedies unless they are confident that competition needs to be restored due to the lack of certainty in its long-term efficacy. *See* United States v. Microsoft Corp., 253 F.3d 34, 80 (D.C. Cir. 2001).

184. Federal antitrust law provides various mechanisms allowing government actors to bring civil antitrust claims against private firms. *See* 15 U.S.C. § 25 (allowing the Attorney General to institute antitrust proceedings in federal court); 15 U.S.C. § 45(a)(2) (empowering the FTC to prevent firms from using unfair methods of competition or engaging in unfair or deceptive acts affecting commerce).

185. 15 U.S.C. § 25.

186. F. Hoffman-La Roche Ltd. v. Empagran S.A., 542 U.S. 155, 170–71 (2004).

consumer and labor welfare concerns equally to determine whether a violation of antitrust laws exists and, if so, how proposed remedies would correct both harms.

This Note's proposed approach would allow courts to better understand how anticompetitive conduct fully harms competition by focusing on both the upstream and downstream effects of the harm as opposed to just the downstream effects. While the addition of other market factors may complicate courts' analyses, this approach would allow courts to implement a fairness vision of antitrust when remedying anticompetitive harm.

C. Consider Worker Welfare Concerns as a Primary Factor in a Merger Review

The federal antitrust enforcement agencies should weigh worker welfare heavily when considering whether to approve a merger. A merger violates Clayton Act § 7 if it would "substantially . . . lessen competition."[187] Section 7 of the Clayton Act gives the FTC and the DOJ power to regulate all mergers.[188] Mergers at or above a certain monetary threshold require the companies involved to notify the FTC and DOJ about the merger and wait 30 days to complete the merger unless either agency requests additional information about the proposed merger.[189]

Under current merger review standards, a merger increases market power if "it is likely to encourage one or more firms to raise prices, reduce output, diminish innovation, or otherwise harm customers as a result of diminished constraints or incentives."[190] The sole focus on product market concentration in a merger review misses the effect that a merger can have on other effects of reduced competition.[191] It is true that a merger could produce efficiencies that result in lower prices for consumers.[192] A fairness vision of antitrust, however, requires looking at more than just harm to consumer welfare to determine whether a merger substantially lessens competition.

Worker welfare should be a primary factor considered when determining whether a proposed merger would substantially lessen competition. An increase in market share in the relevant industry can have a large impact on worker welfare.[193] An example is a hypothetical merger in the food delivery industry. A merger

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187. Clayton Act § 7, 15 U.S.C. § 18.

188. *Id.*; *see also* Sherman Act § 2, 15 U.S.C. § 2.

189. 15 U.S.C. § 18a.

190. U.S. DEP'T OF JUST. ANTITRUST DIV. & FED. TRADE COMM'N, HORIZONTAL MERGER GUIDELINES 2 (2010), https://www.justice.gov/sites/default/files/atr/legacy/2010/08/19/hmg-2010.pdf [https://perma.cc/BW2H-KMWH].

191. POSNER, *supra* note 56, at 32. Posner notes that the DOJ and FTC have never challenged a merger because of possible anticompetitive effects on the labor market. *Id.* at 32–33. At the time of the book's publication, however, the FTC issued an analysis of the labor market impact of a proposed hospital merger in Texas. *Id.* at 33. The analysis argued that the proposed merger would result in "excessive concentration" of the labor market for registered nurses. *Id.*

192. *See generally* Markus Reisinger & Emanuele Tarantino, *Vertical Integration, Foreclosure, and Productive Efficiency*, 46 RAND J. ECON. 461 (2015) (showing that vertical integration can induce the integrated firm to engage in below-cost pricing and can result in mergers with a procompetitive effect).

193. *See* Azar et al., *supra* note 121, at 11–12.

between the major companies would reduce the number of prominent companies from three to two.[194] Additionally, any merger between those companies would increase the newly merged company's market share to a minimum of 40%.[195] This type of market share increase would lead to extreme market concentration.[196] If the market definition is limited to certain geographic markets, the market share increase could be even greater and could lead to a situation where a single food delivery company is the only buyer of labor in a market.

This type of merger would result in a monopsony or monopsonistic conditions, where a single or small group of employers has an advantage over the labor force in a market.[197] While a merger that leaves only two major players in a market does not create a monopsony, it might make it easier for companies to coordinate on wage-fixing policies, which would violate federal antitrust laws. Even if the companies do not fix wages,[198] this merger makes it difficult for an employee to seek more competitive wages by looking to work with a competitor.[199]

Recent legislative proposals, like Senator Amy Klobuchar's antitrust law amendments, might make worker welfare a necessary part of a merger review.[200]

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194. A merger that would reduce the number of major companies in a market from three to two would likely violate Clayton Act § 7. FTC v. H.J. Heinz Co., 246 F.3d 708, 725 (D.C. Cir. 2001) ("The creation of a duopoly affords both the opportunity and incentive for both firms to coordinate to increase prices."). In *H.J. Heinz Co.*, the court held that the FTC could obtain a preliminary injunction against a merger of two competing baby food makers that would have created a duopoly in that market. *Id.* at 727. The court noted that the extreme increase in competition, along with barriers to entry in the baby food market, created the presumption that the proposed merger was anticompetitive. *Id.* at 715–17. Additionally, even after considering post-merger efficiencies and structural barriers to collusion, the court noted that they did not outweigh the strong anticompetitive presumptions and harmful effects to consumer welfare that a merger-to-duopoly would create. *Id.* at 725–27.

195. Using the most recent statistics on food delivery market share, the smallest possible merger between the three companies would be a Grubhub and Uber Eats merger, which would give them a 40% market share. Perri, *supra* note 16. This calculation combines the Uber Eats and Postmates market share numbers after the Uber Eats and Postmates merger. *Id.*; Joe Guszkowski, *Uber Eats Completes Postmates Acquisition*, RESTAURANT BUSINESS (Nov. 30, 2020), https://www.restaurantbusinessonline.com/technology/uber-eats-completes-postmates-acquisition [https://perma.cc/DS4N-96FG].

196. *See* Brown Shoe Co. v. United States, 370 U.S. 294, 343 (1962) ("The market share which companies may control by merging is one of the most important factors to be considered when determining the probable effects of the combination on effective competition in the relevant market.").

197. *See* Julie Young, *Monopsony*, INVESTOPEDIA, https://www.investopedia.com/terms/m/monopsony.asp [https://perma.cc/LU4P-S4T7] (last updated Nov. 21, 2020) (noting that monopsonies can be common in labor markets where a single employer has an advantage over the workforce).

198. *See* U.S. DEP'T OF JUST. ANTITRUST DIV. & FED. TRADE COMM'N, ANTITRUST GUIDELINES FOR HUMAN RESOURCE PROFESSIONALS 7 (2016), https://www.justice.gov/atr/file/903511/download [https://perma.cc/S223-YKJ7].

199. *See* POSNER, *supra* note 56, at 17–19.

200. Competition and Antitrust Law Enforcement Reform Act, S. 225, 117th Cong. (2021); *see also* Jonathan Gleklen et al., *Analysis of the Proposed Competition and Antitrust*

The relevant portion of Senator Klobuchar's bill strengthens Clayton Act § 7 by allowing courts to block a merger if it lowers quality, reduces consumer choice, excludes competitors, reduces innovation, or creates a monopsony along with a monopoly in "any relevant market."[201] This could be important as increased concentration in the food delivery market might create a monopsony in the delivery drivers' market. The bill would probably allow the FTC and DOJ to block mergers that would reduce the number of major food delivery companies in a regional market from two companies to one due to concerns about the monopsony over the labor market that a single, merged food delivery company would control. The proposed legislation also amends Clayton Act § 7 to lower the standard from "substantially . . . lessen" to "materially lessening."[202] This gives antitrust agencies a greater ability to block a merger if they can find a more than de minimis amount of reduced competition.[203]

Even without amendments to the antitrust statutes, courts and federal antitrust agencies can change antitrust precedent as they did in 1979 when they adopted the consumer welfare standard.[204] The current antitrust jurisprudence does not fully capture the harm that stems from anticompetitive business practices. A rise in prices is certainly one factor to be considered when measuring how harmful alleged anticompetitive conduct is. But this ignores other harms that can stem from anticompetitive conduct, like harm to worker welfare in the form of lower wages, which can occur when a corporation has monopsony power over a labor market. Antitrust laws were designed for courts to consider harm to groups outside of consumers like labor.[205] The antitrust laws were implemented due to concerns about how consolidated capital would affect, among other things, wages.[206] By ignoring how anticompetitive practices impact labor and other upstream markets, courts and antitrust agencies are cabining antitrust laws far within their intended boundaries and allowing consolidated capital to depress wages in a preventable manner.

CONCLUSION

This Note has discussed why antitrust law should be used to remedy labor concerns in the gig economy and how current antitrust jurisprudence should be modified accordingly. Gig economy companies like the food delivery platforms are likely here to stay, and it is important to prevent these companies from using their

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Law Enforcement Reform Act of 2021, ARNOLD & PORTER (Feb. 25, 2021), https://www.arnoldporter.com/en/perspectives/publications/2021/02/analysis-of-proposed-antitrust—reform-act [https://perma.cc/3TD9-S72M]. Other legislative proposals have also been introduced that make a labor analysis a necessary part of a merger review. Prohibiting Anticompetitive Mergers Act, S. 3847, 117th Cong. (2022). This proposal amends the Clayton Act to explicitly state that a merger is illegal if it leads to consolidation of the relevant labor market. S. 3847 § 4(a)(2). It further directs the federal antitrust agencies to analyze the labor impacts of each proposed merger and to reject mergers that are harmful to workers. S. 3847 § 4(b)(2).

201. S. 225 § 4(b).

202. *Id.*; *see also* Jonathan Gleklen et al., *supra* note 200.

203. S. 225 § 4(b); *see also* Jonathan Gleklen et al., *supra* note 200.

204. *See Reiter*, *supra* note 129, at 343 (quoting BORK, *supra* note 129, at 66).

205. Orbach, *supra* note 33, at 2262.

206. *Id.*

consolidated capital to suppress wages, deny benefits, and otherwise harm worker welfare.

This Note provided an overview of the history of antitrust and labor laws, where they have intersected, and the current employment classification problem of gig economy workers. It then reviewed the history of the food delivery industry, showing why it is important to modify antitrust and labor law to correct the harms to workers occurring in the gig economy. It set forth three recommendations to modify antitrust law to correct these harms. First, expanding the antitrust labor exemption to cover gig economy workers would allow gig economy workers to organize for better wages and benefits. Second, considering upstream markets such as labor in an antitrust analysis provides courts with a better picture of how anticompetitive business practices harm competition. Finally, weighing worker welfare concerns in a merger review would capture the potential harm to competition that a merger could pose.

These proposals would correct the imbalance between the power of the food delivery platforms and their workforce. It would also return antitrust law to the vision Congress intended when it passed the first federal antitrust laws in 1890. These proposals may cause some harm to consumer welfare, but that was of no concern when Congress passed the antitrust exemption for labor and major labor law reforms during the 1930s. It should not be a concern when grappling with the threats to worker welfare that the gig economy presents.